No. 89-794

IN THE UNITED STATES SUPREME COURT OCTOBER TERM, 1989

DENNIS MICHAEL McCAMBRIDGE,
Petitioner,

v.

THE STATE OF TEXAS,
Respondent.

On Petition For Writ Of Certiorari To The Texas Court Of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether the Due Process Clause of the Fourteenth Amendment to the United States Constitution allows a suspect in custody for suspicion of driving while intoxicated, but prior to the initiation of criminal proceedings, to be provided the limited right to the assistance of counsel prior to submitting to a chemical test or motor skills exercises?

II. Whether the Due Process Clause of the Fourteenth Amendment to the United States Constitution permits a trial judge to reject defendant's claim that his eventual consent to provide a breath sample in a driving while intoxicated prosecution was involuntary where the State produces no evidence to rebut the defendant's evidence of coercion?

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES the State of Texas, Respondent[1] herein, by and through its attorney, the Attorney General of Texas, and files this Brief in Opposition.

OPINION BELOW

The latest opinion of the Texas Court of Criminal Appeals is reported below as *McCambridge v. State*, 778 S.W.2d 70 (1989). A copy of the opinion is attached

[1]For clarity, Respondent is referred to as "the state," and Petitioner as "McCambridge."

to the petition for writ of certiorari as Appendix D. The opinion of the First Court of Appeals of Texas is reported in *McCambridge v. State*, 725 S.W.2d 418 (Tex.App.--Houston [1st Dist.] 1987), and is attached to the petition for writ of certiorari as Appendix C. The first opinion of the Texas Court of Criminal Appeals in this case is *McCambridge v. State*, 712 S.W.2d 499 (1986), and it is also attached to the petition for writ of certiorari as Appendix B. The original appellate review of this case by the First Court of Appeals of Texas is reported in *McCambridge v. State*, 698 S.W.2d 390 (Tex.App.--Houston [1st Dist.] 1985), and is attached to the petition for writ of certiorari as Appendix A.

JURISDICTION

McCambridge relies on 28 U.S.C. § 1257 to invoke the Court's jurisdiction.

CONSTITUTIONAL PROVISIONS INVOLVED

McCambridge bases his claim for relief on the Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

The state has lawful and valid custody of McCambridge pursuant to a judgment and sentence of the County Criminal Court at Law No. 3 of Harris County, Texas. McCambridge was charged with the misdemeanor offense of driving while intoxicated. He filed a pretrial motion to suppress a video tape recording made after his arrest and the results of a breath-alcohol test taken at the time of his arrest. The court suppressed the audio portion of the video tape but denied the rest of his motion. McCambridge thereafter pled guilty to the court and, pursuant to a

plea bargain agreement, was sentenced to six months in jail, probated for two years, and a $200.00 fine.

McCambridge appealed to the Court of Appeals for the First Supreme Judicial District of Texas, which affirmed. *McCambridge v. State*, 698 S.W.2d 390 (Tex. App. -- Houston [1st Dist.] 1985). The Court of Criminal Appeals, on petition for discretionary review, remanded the case for determination whether a person has a right to counsel under the Fourteenth Amendment prior to taking a breath test. *McCambridge v. State*, 712 S.W.2d 499 (Tex. Crim. App. 1986). The Court of Appeals again affirmed, holding that there was no right under the Due Process Clause to the assistance of counsel prior to taking a breath test. *McCambridge v. State*, 725 S.W.2d 418 (Tex. App. -- Houston [1st Dist.] 1987). Once again, the Court of Criminal Appeals granted discretionary review, and affirmed. *McCambridge v. State*, 778 SW.2d 70 (Tex. Crim. App. 1989).

STATEMENT OF FACTS

McCambridge was arrested on May 21, 1984, at approximately 11:00 p.m., for suspicion of driving while intoxicated by two Houston police officers. He asked for a lawyer as he was being placed in the police car and was told that he could not have one until he got downtown. McCambridge was then taken to the police station, where he was placed in a video interrogation room. The police officers read him his *Miranda*[2] rights and he requested a lawyer. McCambridge then was allowed to use the telephone. He called his wife so that she could contact an attorney. After requesting a callback number, McCambridge was told that no incoming calls would be permitted.

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[2]*Miranda v. Arizona*, 384 U.S. 436 (1966).

When McCambridge completed the call to his wife, the police officers began to converse with him. He again requested counsel and was given another opportunity to use the telephone to call a lawyer. McCambridge tried to call his wife back but the line was busy and he hung up. The police then resumed their conversation with him. The transcript of the hearing on McCambridge's motion to suppress does not reveal the content of the these conversations and the videotape is not included in the record. It is unclear whether the police officers were engaging in substantive interrogation or were merely trying to persuade McCambridge to take the breath test.

While in the videotaping room, McCambridge requested counsel seven more times. Upon his eleventh request for counsel, the videotaping was terminated and McCambridge was taken out of the room and into a hallway where he was repeatedly asked to take the breath test. McCambridge agreed after five to ten minutes to provide a breath sample, though he continued to request the presence of an attorney.

McCambridge was taken to the intoxilyzer and was given the statutory breath test warnings required by Tex. Rev. Civ. Stat. Ann. art.6701l-5, §2(b),(Vernon Supp. 1990). McCambridge again agreed to provide a breath sample. Shortly after he took the breath test, at 2:24 a.m. on May 22, 1984, a complaint and information were filed charging him with driving while intoxicated. McCambridge received a pre-trial hearing at which he pressed a motion to suppress the videotape and the results of the breath test. Both McCambridge and the intoxilyzer operator testified at this hearing. The trial court suppressed the audio portion of the tape, but denied suppression of the intoxilyzer results and the video portion of the tape. McCambridge then

pled guilty pursuant to a plea bargain which allowed him to appeal the result of the suppression hearing. He was sentenced to six months confinement in jail, probated for two years, and a $200.00 fine.

SUMMARY OF THE ARGUMENT

There are no special or important reasons advanced that would warrant the Court exercising its certiorari jurisdiction.

McCambridge's claim that a person accused of driving while intoxicated has a right to counsel under the Fourteenth Amendment before deciding whether to submit to a breath test is not properly before the Court because, as a matter of federal constitutional law, he waived all non-jurisdictional defects by entering a knowing and voluntary guilty plea to the charges against him.

There is no factual basis to support McCambridge's legal argument. McCambridge argues for a rule that would create a limited right to consult with an attorney during the brief time after arrest and before the alcohol content of a suspect's blood is dissipated by the liver. It is undisputed that McCambridge was given an opportunity to call an attorney on two separate occasions prior to taking the breath test. Thus, he has already received the benefit he is seeking from the Court.

Schmerber v. California, 384 U.S. 757 (1966), holds that there is no constitutional right to refuse to undergo chemical testing to determine blood alcohol content in a DWI investigation. Although the Texas implied consent statute provides that a suspect may refuse to provide a breath or blood sample, such a suspect does not have a "right" to so refuse but merely

has the physical power to refuse. The refusal to provide a sample is itself an illegal act as evidenced by the automatic revocation of the driving privilege in the event of such a refusal. The assistance of counsel is certainly required to protect substantive rights or to guarantee fundamental fairness in the criminal system, but the assistance of counsel in deciding whether to pursue an illegal course of conduct is clearly improper.

The Sixth Amendment exclusively covers the right to counsel in criminal prosecutions. Under a Sixth Amendment analysis, the right to counsel attaches when formal charges are filed against the accused. *Kirby v. Illinois*, 406 U.S. 682 (1972), *United States v. Gouveia*, 467 U.S. 180 (1984). The right to counsel under the Fourteenth Amendment has evolved in the context of civil, quasi-civil, and appellate proceedings. It would be senseless to engraft upon the Fourteenth Amendment a right already provided by the Sixth Amendment.

A bright line rule which does not require that police allow a DWI suspect to have the assistance of a lawyer prior to deciding whether to take a chemical sobriety test and before the formal filing of charges will ultimately benefit the public. Such a rule will provide consistency of procedure throughout the various police departments. It will ensure predictability in the admission of evidence at trial and will also provide certainty as to the disposition of this issue upon appellate review.

McCambridge's contention that the state presented no evidence to rebut his assertion that he was coerced into submitting to the breath test is contrary to the record. The intoxilyzer operator was called by the state and testified that McCambridge

consented to the breath test because he was worried that he would lose his driver's license. This testimony created a sufficient fact question for the trial judge, as finder of fact in a suppression hearing, to use his experience and discretion to rule against McCambridge.

McCambridge's own testimony did not provide sufficient basis for the trial court to find coercion. McCambridge was not physically threatened, he was not deprived of food, water, or other physical necessities for any significant time, and he was not beaten or verbally abused. He merely sensed that the police officers were hostile and he claims that he was told that he would be found guilty automatically, and he would lose his job if he was found guilty. Such statements, even if made by police officers, would hardly seem credible to a person with even the slightest familiarity with the presumption of innocence and its application in the criminal justice system. Further, such statements were clearly shown to be false when McCambridge was read the statutory warnings required before administering the breath test. For the aforementioned reasons, it is clear that the trial judge denied McCambridge's motion to suppress on the coercion claim because of the facts presented at the hearing, and no question of law is presented.

REASONS FOR DENYING THE WRIT

I.

THE QUESTIONS PRESENTED FOR REVIEW ARE UNWORTHY OF THIS COURT'S ATTENTION.

Rule 17 of the Rules of the Supreme Court provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. McCambridge has advanced no special or important reason in this case, and none exists. There is no factual basis for his assertion of a due process right to counsel inasmuch as he received the right to which he claims he was entitled. The trial court's denial of McCambridge's motion to suppress the results of the intoxilyzer test was based on the court's resolution of conflicting factual assertions, and this Court does not sit to review factual determinations made by lower courts.

II.

McCAMBRIDGE'S GUILTY PLEA WAIVED HIS CLAIM THAT HE WAS ENTITLED TO CONSULT WITH AN ATTORNEY BEFORE DECIDING WHETHER TO TAKE AN INTOXILYZER TEST.

McCambridge's assertion he had a right under the Fourteenth Amendment to the assistance of counsel before deciding whether to take the intoxilyzer test is not properly before the Court. As a matter of federal constitutional law, when he pled guilty, McCambridge

waived all non-jurisdictional defects in the proceedings against him. Thus, any challenge to the validity of his conviction is limited to claims that his plea was unknowing and involuntary. *Tollett v. Henderson*, 411 U.S. 258 (1973). McCambridge, however, makes no allegation that he entered his guilty plea without full knowledge of its consequences. Accordingly, his claim presents nothing for review by this Court.

III.

THE UNCONTROVERTED FACTS PROVIDE NO BASIS FOR THE LEGAL ISSUE ARGUED IN THIS CASE BECAUSE McCAMBRIDGE WAS TWICE AFFORDED A REASONABLE OPPORTUNITY TO SPEAK WITH A LAWYER.

McCambridge cites to the opinions in *Kuntz v. State Highway Commissioner*, 405 N.W.2d 285 (N.D. 1987), *State v. Juarez*, 775 P.2d 1140 (Ariz. 1989), *Sites v. State*, 481 A.2d 192 (Md. 1984), and *State v. Newton*, 636 P.2d 393 (Or. 1981), as instances where courts in other jurisdictions have found that a person arrested for driving while intoxicated has a right to counsel under the Due Process Clause of the Fourteenth Amendment prior to deciding whether to take a chemical test. He argues that the contrary conclusion of the Texas courts in his case is reason to justify the granting of certiorari. *See* Petition at 11. A careful reading of those cases reveals that *McCambridge* is consistent with their holdings because McCambridge was afforded the reasonable opportunity to contact counsel on two occasions. The cases he cites hold only that an accused in a DWI investigation has a limited

right to counsel that would not unreasonably delay the administration of the breath test.

Kuntz v. State Highway Commissioner was a license revocation case, a civil proceeding. Accordingly, its holding that the Due Process Clause affords a person arrested for DWI the right to consult with an attorney before deciding whether to take a breath test is inapplicable to McCambridge's criminal case.[3] Of interest, however, is the court's holding that, even in a civil context,

> [i]f the person arrested is unable to reach an attorney by telephone or otherwise, within a reasonable time, he can be required to elect between taking the test and refusing it without the aid of an attorney.

Kuntz, 405 N.W.2d at 290.

The record here shows that McCambridge was arrested at approximately 11:00 p.m. and taken to police headquarters. He was formally charged with driving while intoxicated at 2:24 a.m., shortly after taking an intoxilyzer test. Thus, it was approximately three hours after his arrest before McCambridge gave the breath sample. During that time, he was given two opportunities to contact an attorney, although his efforts were unsuccessful. The accuracy of the test diminishes with the passage of time and dissipation of alcohol from the body's system, and McCambridge

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[3]As noted *infra*, the due process right to counsel generally has been restricted to civil, quasi-civil, and appellate cases since the Sixth Amendment's requirement of counsel in criminal cases was extended to the states by the Fourteenth Amendment. *See Gideon v. Wainwright*, 372 U.S. 335 (1963).

cannot show that it was unreasonable of the police to require him after that long a time to "elect between taking the test and refusing it without the aid of an attorney."

State v. Juarez was a criminal prosecution in which the Arizona Supreme Court held that it was a violation of the *Sixth Amendment's* right to counsel to deny the accused in a DWI case the opportunity to call an attorney during the mandatory 20-minute observation period prior to videotaping because such a phone call would not disrupt the investigation or unreasonably delay the breath test. 775 P.2d at 1145. The court did not discuss the applicability of the Fourteenth Amendment in such a case. Consequently, *Juarez* is not relevant to this case.

Sites v. State, 481 A.2d 192 (Md. 1984), is at the very heart of McCambridge's argument. In *Sites*, the Maryland Supreme Court held that the Fourteenth Amendment guarantees a DWI suspect the reasonable opportunity to contact a lawyer before deciding whether to take a test to determine whether he was intoxicated. *Id.* at 200. However, the defendant in *Sites*, unlike McCambridge, was denied any access to a telephone despite his repeated requests. The court stressed that the right to counsel was limited in that it could not unreasonably delay administration of the test.

> We emphasize that in no event can the right to communicate with counsel be permitted to delay the test for an unreasonable time since, to be sure, that would impair the accuracy of the test and defeat the purpose of the statute.

Id.

In *Newton*, the Oregon Supreme Court noted that the Sixth Amendment right to counsel does not attach at the time an accused had to decide whether to submit to a chemical test, but concluded that due process prohibits the state from "unlawfully restricting [a defendant's] liberty [to call counsel]." 636 P.2d at 407. As in *Sites* and *Kuntz*, however, the right is limited to those circumstances where there is no danger that "highly evanescent" evidence would be destroyed by the resultant delay. *Id.* at 406. Significantly, the *Newton* court found that it was unnecessary to suppress the results of the breath test there because there was no indication that the accused would have gotten in touch with an attorney and no assurance that, had he done so, the attorney would have advised him to refuse to take the test. 636 P.2d at 407. McCambridge similarly would not be entitled to relief even under *Newton*, because he had the opportunity to contact an attorney. Further, his contention that counsel would have advised him to submit a blood test rather than a breath test, and to perform the videotape skills exercises (Petition at 15-16) is sheer speculation, unsupported by anything in the record.

McCambridge concedes that on two separate occasions, after requesting a lawyer, he was allowed to use the telephone for that purpose. (Petition at 5-6). Instead, he called his wife with instructions to find him a lawyer. When McCambridge continued to request counsel, the police could have (1) referred him to a specific criminal lawyer, (2) waited an indefinite amount of time until his wife had a lawyer call the police station, or (3) persisted in their requests for a breath sample. The first option would be highly improper for obvious reasons. The second would have resulted in an unreasonable delay while his blood was cleansed of its inculpatory alcohol content. The third

course, which was the one actually pursued, was the only reasonable alternative.

Even if one applies the law of the various jurisdictions which have created a limited right to counsel before submitting to a breath test to the facts of *McCambridge*, the result would be the same. Therefore, this case does not provide the factual context in which to decide this important question of constitutional law. As such, this case is unworthy of this Court's attention and the petition for writ of certiorari should be denied.

IV.

UNDER *SCHMERBER V. CALIFORNIA*, THERE IS NO CONSTITUTIONAL RIGHT TO REFUSE TO TAKE A BREATH TEST. THEREFORE, NO ISSUES INVOLVING THE PROTECTION OF A SUBSTANTIVE RIGHT OR OF FUNDAMENTAL FAIRNESS UNDER THE DUE PROCESS CLAUSE ARE PRESENTED BY THIS CASE.

In *Schmerber v. California*, 384 U.S. 757 (1966), the Court held that the results of blood alcohol tests made from samples forcibly taken from an accused are admissible at trial. In so holding, the Court rejected claims based on due process of law (Fourteenth Amendment), self-incrimination (Fifth Amendment), and assistance of counsel (Sixth Amendment). The Court reasoned that because an accused is not entitled to follow counsel's advice to refuse to submit to non-testimonial procedures which gather physical evidence such as fingerprinting, photographing, or lineups, he is not entitled to refuse to submit to a chemical sobriety test even if so advised by counsel. *Id.* at 764.

The *Schmerber* opinion also specifically noted that because the blood is continuously cleansed of its alcohol content by the liver, a refusal to submit to a blood or breath test amounts to the wrongful act of "destruction of evidence." *Id.* at 770. That the refusal to provide a sample is itself an illegal act is substantiated by the mandatory suspension of the refuser's driver's license in Texas. Tex. Rev. Civ. Stat. Ann. art. 6701l-5, §2(f). Many other states follow the theory that refusing a sobriety test is wrongful and the driver has no lawful choice in the matter. *People v. Sudduth*, 421 P.2d 401, 403 (Cal. 1966), *cert. denied*, 389 U.S. 850 (1967); *State v. Durrant*, 55 Del. 510, 188 A.2d 526 (1963); *State v. Bock*, 80 Idaho 296, 328 P.2d 1065 (1958); *Alldredge v. State*, 239 Ind. 256, 156 N.E.2d 888 (1959); *State v. Benson*, 230 Iowa 1168, 300 N.W. 275 (1941); *Gardner v. Commonwealth*, 195 Va. 945, 81 S.E.2d 614 (1954); *State v. Dugas*, 252 La. 345, 211 So.2d 285 (1968); *State v. Meints*, 189 Neb. 264, 202 N.W.2d 202 (1972); *State v. Cary*, 49 N.J. 343, 230 A.2d 384 (1967); *City of Westerville v. Cunningham*, 15 Ohio St.2d 121, 239 N.E.2d 40 (1968); *Commonwealth v. Robinson*, 229 Pa.Super. 131, 324 A.2d 441 (1974); *State v. Miller*, 257 S.C. 213, 185 S.E.2d 359 (1971); *City of Waukesha v. Godfrey*, 41 Wis.2d 401, 164 N.W.2d 314 (1969).

However, various states, including Texas, recognize that DWI suspects have the physical power to resist the administration of a sobriety test and provide in their implied-consent statutes that if the suspect refuses to provide a breath or blood sample then "none shall be taken." Tex. Rev. Civ. Stat. Ann. art. 6701l-5, §2(a). Such a provision, however, does not elevate the power to refuse into a right to refuse. It is merely a realization by the state that police officers fighting drunks in the jailhouse over a breath sample is an ugly

spectacle which should be avoided.[4] The court in *Bush v. Bright*, 264 Cal.App.2d 788 (1968), stated the proposition more eloquently: "The obvious reason for acquiescence in the refusal of such a test by a person who as a matter of law is 'deemed to have given his consent' is to avoid the violence which would often attend forcible tests upon recalcitrant inebriates." *Id.*, at 790.

This analysis leads to the inescapable conclusion that there is no substantive right to refuse a sobriety test in a DWI investigation. Further, fundamental fairness could not possibly be compromised by restricting a person's ability to commit an illegal act. Notwithstanding McCambridge's assertions to the contrary (Petition at 15), defense counsel routinely advise their clients not to submit to sobriety tests because such evidence is usually inculpatory. Such admonitions are tantamount to advising a client to commit an illegal act and should not be encouraged under findings of constitutional propriety. In this case, as in *Schmerber*, "no issue of counsel's ability to assist petitioner in respect of any of the rights he did possess is presented." 384 U.S. at 766.

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[4]Texas, however, has provided that forcible taking of a sample is required if, as the result of a collision or other accident, someone has died or is close to death. V.A.C.S., Article 6701l-5, §3(i).

V.

THE SIXTH AMENDMENT RIGHT TO COUNSEL EXCLUSIVELY COVERS CRIMINAL PROSECUTIONS, WHILE THE FOURTEENTH AMENDMENT ADDRESSES THE RIGHT TO COUNSEL IN CIVIL, QUASI-CIVIL, AND APPELLATE PROCEEDINGS.

The Sixth Amendment to the United States Constitution provides that "In all criminal prosecutions, the accused shall enjoy the right ... to have assistance of counsel for his defense." The plain language of this amendment indicates that it applies to criminal cases. This Court, however, in *Powell v. Alabama*, 287 U.S. 45 (1932), held that the Due Process Clause of the Fourteenth Amendment requires the states to provide counsel to a criminal defendant exposed to the death penalty. The state here does not quarrel with the rule of *Powell*, but submits rather that the philosophical basis for finding a right to counsel -- fundamental fairness -- under the Fourteenth Amendment in criminal prosecutions is no longer advantageous or necessary given the historical development of constitutional doctrine.

In 1932, this Court had not yet begun to selectively apply the Bill of Rights to the states. At that time, the Court needed a mechanism with which to address egregious injustices suffered by citizens at the hands of state courts. The Fourteenth Amendment and its attendant analysis of fundamental fairness served admirably in this regard. In 1963, however, such needs were obviated by *Gideon v. Wainwright*, 372 U.S. 335, which made the Sixth Amendment applicable to the states through the Fourteenth Amendment. Nonetheless, the Sixth Amendment by its own terms

still applied only to criminal prosecutions. The right to counsel under the Fourteenth Amendment survived to provide guarantees of fairness in other contexts.

Goldberg v. Kelly, 397 U.S. 266 (1970), held that welfare recipients are entitled to a hearing, and appointed counsel, before their benefits can be terminated. This holding demonstrated that the right to counsel could obtain in a civil context. *In re Gault*, 387 U.S. 1 (1967) (juvenile delinquency proceedings), and *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) (parole or probation revocation proceedings), established a Fourteenth Amendment right to counsel in quasi-civil matters. *Douglas v. California*, 372 U.S. 353 (1963) and *Evitts v. Lucy*, 469 U.S. 387 (1985), gave indigent defendants the right to effective counsel on appeal.

Having established that the Sixth Amendment right to counsel controls criminal cases at the trial court level, one needs to determine when that right attaches. *Kirby v. Illinois*, 406 U.S. 682, 689 (1972), held that the right to counsel attaches when adversary judicial proceedings are initiated against the accused and the government has committed itself to prosecute. This filing of formal charges is the essence of the "critical stage" analysis. The mere gathering of evidence such as fingerprinting or taking blood samples has been held not to constitute a critical stage which requires the assistance of counsel. *United States v. Wade*, 388 U.S. 218, 227-28 (1967).

A DWI prosecution is obviously a criminal case. Here, McCambridge seeks to avoid the Sixth Amendment and its critical stage analysis because formal charges were filed against him only after he voluntarily took the breath test. He seeks to have this Court engraft a right which is already granted by the Sixth Amendment onto the Fourteenth Amendment so

that he can avoid conviction for his crime. From McCambridge's viewpoint, this is self-serving at best. From a legal perspective it is confusing and senseless at the very least.

VI.

A BRIGHT-LINE RULE THAT PROVIDES FOR A RIGHT TO COUNSEL WHEN CRIMINAL PROCEEDINGS ARE INITIATED WILL SERVE IMPORTANT PUBLIC POLICY CONCERNS.

This Court has on numerous occasions stressed the virtue of bright-line rules in the area of law enforcement. *See, e.g., Arizona v. Roberson*, 486 U.S. 675, 681 (1988); *Michigan v. Jackson*, 475 U.S. 625, 634 (1986). Such rules serve to inform the police and prosecutors exactly what is required of them in conducting criminal investigations. They further allow both trial and appellate courts to rationally and consistently determine whether violations of a defendant's rights have occurred and, if so, what corrective measures are necessary. The less ambiguity there is in the rule, the more likely that it will be adhered to. Litigation seeking to refine arcane facets of constitutional protections will thus be reduced, and the truth-finding purpose of the trial will be furthered. A rule that makes it clear that the right to counsel attaches in all cases only when formal adversarial proceedings have begun places no undue burden on the accused and promotes fairness and consistency in conducting all criminal investigations. To adopt the rule McCambridge seeks would introduce confusion and uncertainty into the process, while producing no measurable gain to defendants.

VII.

THE RECORD REFLECTS THAT THE STATE INTRODUCED SUFFICIENT EVIDENCE AT THE SUPPRESSION HEARING TO SUPPORT THE TRIAL COURT'S DETERMINATION THAT McCAMBRIDGE VOLUNTARILY SUBMITTED TO THE INTOXILYZER TEST.

McCambridge contends that the state failed to controvert his testimony at the suppression hearing that he took the intoxilyzer test only because he was coerced by the police. Thus, he contends, the results of the test should have been suppressed. The record reflects, however, and McCambridge concedes, that the state called the intoxilyzer operator to testify at the suppression hearing. He testified that he read McCambridge the warnings required to be given by Tex. Rev. Civ. Stat. Ann. art. 6701l-5, §2(b), *viz.*, that if he refused to give the breath specimen, his refusal could be used as evidence against him in any subsequent prosecution, and that his license to drive would be suspended automatically for ninety days. The officer further testified that McCambridge stated he would take the breath test because he was concerned about losing his driver's license.

At no time, either at the suppression hearing or in his brief, has McCambridge contended that he was physically threatened or abused, that he was deprived of any physical necessities, such as food or water, that he was beaten, or that he was verbally abused. Although he claimed the police were hostile to him, he did not inform anyone that he felt compelled to take the intoxilyzer test because of any police overreaching. Indeed, his only comment that appears in the record was his statement to the intoxilyzer operator, after

being informed of the effects of his refusal, that he was concerned about losing his license and would take the test to avoid having that happen. The testimony of the intoxilyzer operator clearly contradicted McCambridge's claim that he was coerced into taking the test, and was sufficient to support the trial court's finding that his decision to give a breath sample was voluntary and not the result of police coercion.

CONCLUSION

For the foregoing reasons, the state respectfully requests that the petition for writ of certiorari be denied.

Respectfully submitted,

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